

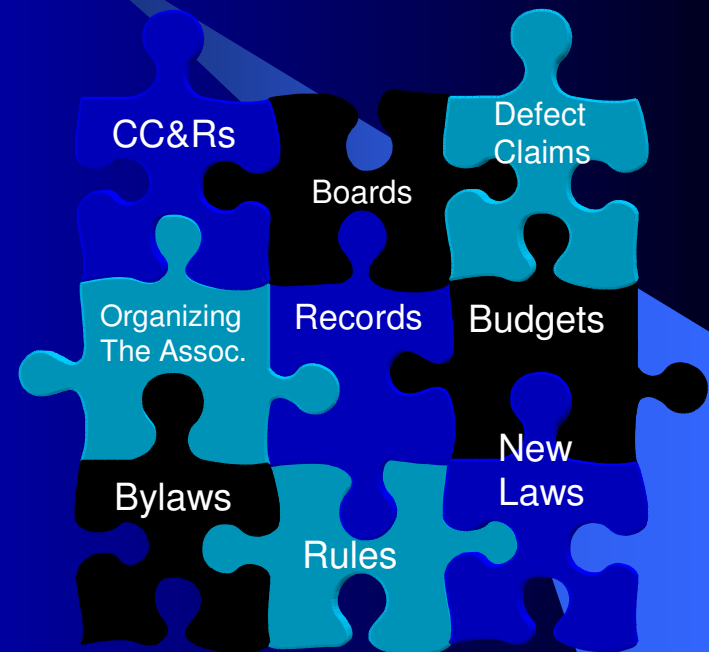
Association Board Membership: How to Avoid Making a D&O Insurance Claim

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Overview

- General Legal Landscape
- Board Member Liability
- Prudent Acts by Boards
- Hot Topics
- Legislative Action
- Maintenance Plans
- Governing Document Summary



General Legal Landscape

- Oregon / Washington law
- Homeowner Associations
- Condominium Owners Associations
- “New” or “Old” Acts

Organizing the Association

- Oregon Planned Community Act (PCA):
 - May be for-profit or non-profit corporation, or an unincorporated association (ORS 94.625)
 - Unincorporated associations may be incorporated by vote of majority of unit owners unless declaration or bylaws provide otherwise (see ORS 100.405(1)(b))
- Washington Home Owners' Act (HOA):
 - Can be a corporation, unincorporated association, *or other legal entity*
 - Unlike Oregon, there are no specific statutory provisions to make changes in legal entity form. Check the Declaration and the Bylaws!

Declaration

- Declaration is key governing document
 - Trumps inconsistent provisions in bylaws (see, e.g., ORS 94.630(1))
 - In Oregon, *condominium* declaration expressly does not trump if inconsistent with condominium statutes (ORS 100.122) - no parallel provision in PCA
 - In Washington, declaration prevails over bylaws, unless inconsistent with WCA (RCW 64.34.208)

Bylaws - Oregon

- Bylaws cannot require greater than an affirmative majority of votes
- If bylaw duplicates a declaration element, an amendment must meet declaration amendment requirements (i.e., minimum 75%)

Bylaws Oregon: Required elements

- Initial meeting
- Transitional advisory committee
- Turnover meeting
- Annual meetings
- Board elections and terms
- Board meetings
- Officer selections
- Budget
- Maintenance and repair program
- Initial employment contracts for maintenance and repair
- Collection of common expenses
- Insurance coverage
- Annual financial statements
- Methods for adopting administrative rules and regulations governing common property
- Method to amend the bylaws

Bylaws Wash: Required elements

- Required elements (*Unless otherwise provided in the other governing documents!*)
 - Number, qualifications, powers, duties, terms of office, and manner of electing and removing the Board and officers
 - Procedure for election by the Board of the officers of the association
 - Identify powers the Board or officers may delegate
 - Which officers can prepare, execute, certify, and record amendments to the governing documents on behalf of the association
 - Method to amend the bylaws
 - Anything else the association deems necessary and appropriate, and not inconsistent with the governing documents
- Washington does not have voting restrictions similar to Oregon

“New” v. “Old” Acts

- Oregon
 - “Old” Act (ORS 94)
 - “New” Oregon Condo Act (ORS 100)
- Washington
 - “Old” Horizontal Property Regimes Act (RCW 64.32)
 - “New” Washington Condo Act (RCW 64.34)

Board Member Liability

- Legal Duty of Care of Board Member
- Responsibilities and Obligations to HOA
- Responsibilities and Obligations to Board
- Attorney-Client Privilege

Duty of Care of Board Member

- Tied duty of care to the Nonprofit Corporation Act in both states
- Better Judgment Rule
 - “...act in all instances on behalf of the association. In the performance of their duties, the officers and members of the board of directors are required to exercise ... ordinary and reasonable care”
- Fiduciary duty for Declarant as member of board

Board Member Liability (cont.)

- Case Studies
 - Responsibilities and Obligations to HOA
 - Responsibilities and Obligations to Board
- Attorney-Client Privilege

Prudent Acts by Boards

- Meetings
- Financials
- Record Retention
- Response to Homeowner Issues
- Investigations
- Reserve Studies

Board Meetings - Oregon

- Most meetings must be open to owners
- Executive session [closed] meetings may be for purpose of:
 - consultation with counsel
 - personnel matters
 - negotiation of third party contracts
 - discussion of collection of unpaid assessments

Meetings and Voting - Oregon

- Annual and Special and Written Ballot in Lieu of Meeting
 - Special Meetings can be called in several ways
 - By Board President
 - By majority vote of Board
 - By vote of % of owners specified in Bylaws (but not less than 10% and not more than 50%)
 - If the Bylaws don't say, 30% vote may call a Special meeting
 - Written Ballot In Lieu of Meeting

Oregon- Meeting Notice

- Notice must be *hand delivered or mailed* to the address of each lot or the owner-designated address and to all mortgagees that request notices.
 - Not less than 10 days and not more than 50 days before a meeting
 - Notice must state time and place and items on the agenda
 - Additional reqt's found in ORS 100.407

Oregon- Procedure

- Unless other rules required by Declaration or Bylaws, Roberts Rules of Order governs conduct of meeting.
- One lot – one vote . . . unless Declaration says something else
- Proxies and Absentee Ballots
 - Allowed unless the Bylaws prohibit
 - Owner cannot revoke except by actual notice to the presiding officer or Board
 - Undated proxies are not valid

Oregon- Quorum

- Quorum equals # of people entitled to cast 20% of votes *and* who are present in person or by proxy *at the beginning of the meeting* unless the Bylaws provide a different standard. ORS 100.407

Board Meeting - Washington

- Most meetings must be open to owners [RCW 64.38.035(2)]
- Executive session meetings may be for purpose of
 - consultation with counsel
 - considering communication with legal counsel
 - personnel matters
 - discussion of possible violation of governing documents
 - discussion of possible owner liability to an association
 - discuss likely or pending litigation

Association Meeting - Washington

- Annual and Special Meeting
 - No particular provision for absentee ballots (Look at Governing Documents)
 - Special Meetings can be called in several ways:
 - By Board President
 - By majority vote of Board
 - By vote of 10% of owner voting interests
 - Notice must be *hand delivered or mailed* to the address of each owner and any other owner-designated address

Washington - Notice

- Not less than 14 days and not more than 60 days before a meeting
- Notice must state time and place and items on the agenda

Washington- Procedure

- Quorum equals # of people entitled to cast 25% of votes *and* who are present in person or by proxy *at the beginning of the meeting* unless the Bylaws or Declaration provide a different standard. RCW 64.34.336
- Board Meeting: Quorum equals 50% of voting members
- Proxies and Absentee Ballots – check the governing documents

Budgets & Financials - Oregon

- Bylaws must specify the process to adopt the budget
- Unless Bylaws provide otherwise, Board must adopt a budget annually and provide a summary 30 days after adoption to each homeowner
- If the Board fails to adopt a budget, the last annual budget remains in effect for the new year. ORS 100.412

Budgets & Financials - Oregon

- Within 90 days after close of fiscal year prepare annual financial statements and distribute
- If assessments exceed \$75K annually, association's financials must be reviewed by CPA within 180 days of close of fiscal year. ORS 94.670*
- An association can dispense with reviews upon vote of 60% of non-declarant controlled voting interests

Budgets & Financials – Wash.

- Board must adopt a budget annually and within 30 days call a ratification meeting
- The meeting date must be 14-60 days after mailing of a summary of the budget
- 50% of voting interests required to *reject* budget
- No quorum required to ratify the budget

Budgets & Financials – Wash.

- If assessments exceed \$50K annually, association's financials must be audited by CPA within 180 days of close of fiscal year
- An association can dispense with audits upon vote of 67% of votes cast by owners

Record Retention - Oregon

- Permanently retain all documents received from the developer at the turnover meeting – you can find a list at ORS 94.616
- Proxies and ballots must be kept for one year following the vote
- Must also retain records consistent with the Nonprofit Corporation Act [see ORS 65.771] even if not a nonprofit corporation!

Access to Records - Oregon

- Owners may make a written request to examine and duplicate documents of the Association if in ‘good faith’ and for a ‘proper purpose’. Association has 10 days from receipt of a request to produce the documents
- Exempt records include:
 - Communication with legal counsel
 - Contracts in current negotiation
 - Personnel matters
 - Executive session documents
 - Individual owner files

Record Retention - Washington

- Associations are required to maintain financial and other records ‘sufficiently detailed to enable the association to fully declare to each owner the true statement of its *financial* status.’ RCW 64.38.045(1) (emphasis added)
- Query whether this relieves a nonprofit corporation from complying with nonprofit Act record requirements

Access to Records - Washington

- ALL records of the association are available to owners and mortgagees and their agents. RCW 64.38.045(2)
 - Only exception: unlisted telephone numbers

Response to Homeowner Issues

- Based upon:
 - Declaration
 - Bylaws
 - CCRs
 - Statute
- Uniform application
 - NOT arbitrary or capricious

Investigations

- New Association
 - Turnover
 - WA v. OR
- Nearing statute of limitations
- Upon evidence of problems
 - Reserve Study Expert
 - Homeowner
 - Property Mgr
- Ostrich Syndrome

Construction Defect - Oregon

- Association has standing to initiate or intervene in any litigation regarding matters :
 - ‘Relating to or affecting’ common property including actions for damage, destruction, impairment, or loss of use
 - ‘Relating to or affecting’ lots or interests of individual owners resulting from nuisance or defect in or damage to common property
 - Any matter which the association has standing by law *or under the declaration or bylaws* [self-appointed standing]

Construction Defect – cont'd

- Before any litigation is commenced against a developer/contractor:
 - Association must initiate a Notice of Defect and follow the strict timelines contained in ORS 701.560-701.595
 - Contractor may, within 14 days of receipt of notice, request an inspection; Association must make properties available for inspection not later than 20 days after receiving a request
 - Contractor has 90 days from Notice of Defect to make a response
 - No obligation to accept offer, but litigation cannot commence prior to process playing out

Construction Defect - Washington

- Association has standing to initiate or intervene in any litigation regarding:
 - On matters “affecting the homeowners’ association”
 - On behalf of itself, or on behalf of two or more members
 - Not on behalf of owners involved in disputes not a responsibility of the HOA

Construction Defect – cont'd

- Boards of HOA's *must* deliver notice of commencement or anticipated commencement of a construction defect action to the members
 - Notice must describe action and relief sought
 - Notice must provide estimate of anticipated expenses and fees to be incurred. RCW 64.50.040
- Before any litigation is commenced against a developer/contractor:
 - Association must initiate a Notice of Claim and follow the strict timelines contained in RCW 64.50.020
 - Very similar in nature to Oregon process, but different timelines

Reserve Studies - Oregon

- Declarant must conduct initial reserve study
- Reserve Account is for all items of common property
 - that will require partial or full replacement in 3-30 years;
 - For exterior painting of common property
 - Other items for which association has maintenance burden
- Reserve Account does not include reserves for items that can “reasonably be funded by annual operating assessments”

Reserve Studies - Oregon

- Boards must annually conduct a study to update
- Owners can reduce or increase future assessments by 75% vote
- Owners can annually choose not to fund by unanimous vote
- Assessments paid to Reserve Account are not refundable to owners

Reserve Studies – Wash.

Hot Topics

- Insurance
- Smoking
- Rental Caps
- Rule Enforcement
- Others?

Rules and Enforcement - Oregon

- Association may adopt rules for the operation and use of the common property [ORS 94.635(15)]
 - Bylaws set process
 - Must provide for notice and opportunity to be heard if the rules will terminate access/use of common property or impose fines for violations [ORS 94.630(1)(m)-(n)]
 - Must adopt and mail any fine schedule to each owner prior to imposing fines

Rules and Enforcement – cont'd

- Failures to comply may be enforced by:
 - Fines
 - Termination of Access/Use of Common Property
- Generally fines will be treated as unpaid assessments
 - Allows for lien claim against owner property [ORS 94.709]
 - Can pursue as ordinary action for money judgment w/o waiving lien rights
- Alternative Resolution
 - Association must offer mediation before suing [ORS 94.630(4)]
 - Association may use a 'Permit' as a means to selectively allow a technical violation [ORS 94.630(3)]

Legislative Action

- Washington
- Oregon

Maintenance Plans

- Oregon only
- New law effective 1/1/06
- Requires 30-year plan
 - “The reserve study shall include a 30-year plan for the maintenance, repair and replacement of common elements and association property...”
- Amendment to current reserve study statutes

Governing Document Summary

- Statutory Requirements
- Amendment Process
- Disclosure Requirements for Sale of Units

Declaration Amendments

- Oregon Planned Community Act (PCA):
 - Amendment requires at least 75% or greater approval (if in declaration) of owners required.
 - Amendments are effective on recording
- Washington Home Owners' Act:
 - Adoption and amendment of *bylaws, rules and regulations* is allowed
 - No statutory mandate allowing amendments to declarations. Must look to the declaration to determine powers of the Association and voting requirements

Declaration Amendments

- Oregon Condo Act:

- Amendment requires at least 75% or greater approval (if in declaration) of owners required.
- Amendments are effective on recording

- Washington Condo Act:

- No statutory voting percentage required, unless:
 - Alters size, interest or use of unit, then 90% approval required

Bylaw Amendments

- Oregon Condo Act:

- Amendment requires approval by majority of unit owners, unless age, pet, # of persons, or rental of units (75% approval)
- Requires Real Estate Commissioner if in first 5 yrs
- Effective upon approval

- Washington Condo Act:

- Default to “method of amending the bylaws”

Disclosure Requirements

- Washington
 - Resale Certificate (RCW 64.34.425)
- Oregon
 - Multiple disclosure statutes (ORS 100.720-.750)

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